

1990

Dale J. Tiffany v. State of Utah : Petition for Writ of Certiorari

Utah Supreme Court

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R. Clayton Huntsman; Attorney for Petitioner and Defendant.

Paul Van Dam; Attorney General; David B. Thompson; Assistant Attorney General; Attorneys for Plaintiff and Respondent.

Recommended Citation

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DOCKET NO.

BRIEF

900101

IN THE UTAH SUPREME COURT

DALE J. TIFFANY,

Petitioner and Defendant,

vs.

STATE OF UTAH,

Respondent and Plaintiff.

)
) PETITION FOR WRIT OF
) CERTIORARI TO THE
) UTAH COURT OF APPEALS
)
)
)

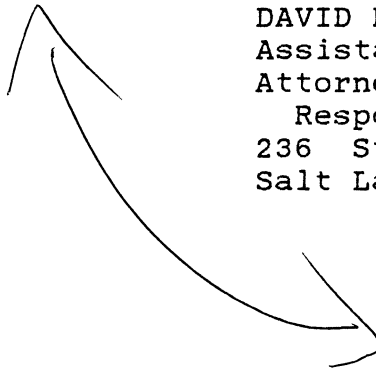
900101

) Case No. 890602-CA
)
)
)

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Assistant Attorney General
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FILED

MAR 5 1991

Clerk, Supreme Court, Utah

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Telephone: (801) 628-2846

IN THE UTAH SUPREME COURT

DALE J. TIFFANY,)	
)	
Petitioner and Defendant,)	PETITION FOR WRIT OF
)	CERTIORARI TO THE
vs.)	UTAH COURT OF APPEALS
)	
STATE OF UTAH,)	
)	
Respondent and Plaintiff.)	Case No. 890602-CA

Dale J. Tiffany respectfully files the following petition for writ of certiorari to review the Order of the Utah Court of Appeals in this case.

The caption above contains the names of all parties to the proceeding in the court whose judgment is sought to be reviewed.

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II. QUESTIONS PRESENTED FOR REVIEW

1. Whether all appeals, including interlocutory, in criminal case are controlled by Utah R. Crim. Pro. 26(4)(a), which allows 30 days after entry of the judgment appealed from, or by R. Utah Ct.App. 5(a), which requires petitions for permission to appeal from interlocutory orders to be filed within 20 days after entry of order
2. Whether Petitioner herein in fact appealed to the Utah Court of Appeals within 20 days from date bindover order was filed in circuit court.

III. REPORTS OF OPINIONS

Other than Appendix A, the Order from which review is sought, Defendant is unaware of any official or unofficial reports of any opinions issued by the Court of Appeals.

IV. JURISDICTION

Grounds on which the jurisdiction of this court is invoked are:

A. The date of the entry of the decision sought to be reviewed is January 4, 1990.,

B. (1) No rehearing was sought. No hearing was afforded.

(2) This court, through Hon. Michael Zimmerman, granted an extension of time on February 5, 1990, to March 5, 1990, upon Petitioner's ex-parte motion for same.

C. No cross-petition has been filed.

D. Statutory provisions believed to confer on this Court jurisdiction to review the decision in question by a writ of certiorari are Rules of the Utah Supreme Court 42, and 43, and Utah Code Ann. §78-2-2(3)(a), which provides that "the review of...an order...of the Court of Appeals" shall be by petition for a writ of certiorari to this Court, and §78-2-2(3)(a) specifically confers "jurisdiction of interlocutory appeals" over judgments of the Utah Court of Appeals.

V. CONTROLLING PROVISIONS OF LAW

A. CONSTITUTIONS

(1) U.S. CONST. amend. V: "No person shall be...deprived of life, liberty, or property, without due process of law.

(2) U.S. CONST. amend XIV: ... "Nor shall any state deprive any person of life, liberty, or property, without due process of law;....

(3) UTAH CONST. Art. I §7: "No person shall be deprived of life, liberty or property without due process of law.

B. RULES OF COURT:

1. Rules of the Utah Court of Appeals 5(a):

Petition for permission to appeal. In cases before a district court, juvenile court, or circuit court, in which a direct right of appeal would lie to the Court of Appeals, an appeal from an interlocutory order may be sought by any party by filing a petition for permission to appeal from the interlocutory order with the clerk of the Court of Appeals within 20 days after the entry of such order of the district court, juvenile court, or circuit court, with proof of service on all other parties to the action.

2. Utah Rules of Criminal Procedure 26(4)(a):

All appeals in criminal cases shall be taken within 30 days after the entry of judgment appealed from, or, if a motion for a new trial or arrest of judgment is made, within 30 days after notice of the denial of the motion is given to the defendant or his counsel. Proof of giving notice shall be filed with the court. (Emphasis added).

3. Utah Rules of Criminal Procedure 26(2)(c):

An appeal may be taken by the defendant from...

(c) an interlocutory order when, upon petition for review, the appellate court decides that the appeal would be in the interest of justice;

VI. STATEMENT OF THE CASE

Petitioner Dale Tiffany was charged the second degree felony of forcible sexual abuse on March 14, 1989, in Wayne County, Utah, for an offense allegedly occurring on March 15, 1985. The Sixth Circuit Court in and for Wayne County, after having taken evidence, signed a bindover order on September 11, 1989. Same was filed, apparently on September 12, 1989. Petitioner's legal counsel, who lives in St. George, Utah, telephoned the clerk of the court on several occasions to see if the order had been signed and entered. The clerk indicated that "Tex [County Attorney] should have sent you one." The clerk then agreed to mail a copy of the order to defense counsel. Same arrived on September 27, 1989.

Defendant then filed a petition for permission to appeal from an interlocutory order, as well as a notice of appeal. Defendant quickly sought to have the notice of appeal dismissed or merged, and proceeded only on the petition. Basis of the petition was that the evidence only showed brief and light touching of outer clothing, with "victim" himself stating that no pain or sexual gratification occurred.

Defendant's records show initial filing by the Court of Appeals on October 6, 1989. See Exhibit B, attached hereto. A letter from the Court of Appeals showed the ~~Petition~~ had been

Notice of
Appeal
RCW

filed October 10, 1989. See Exhibit C, attached hereto. The Court of Appeals in its Order (see Exhibit A), stated that the petition was filed October 12, 1989.

The Court of Appeals ruled that the Petition for Permission to Appeal was 3 days late; that the 20 day limitation of Utah Ct. App 5(a) applies, and not the 30 day rule for all appeals in criminal cases under Utah R. Crim. Pro. 26(4)(a).

Defendant hereby seeks this Court's review of that ruling.

VI. ARGUMENT

Criminal defendants, because of the devastating consequences state action can have against them, are entitled to many presumptions, burdens (or absence of same), benefits, and rights not found in any other aspect of our legal system.

One such right is due process, as found in U.S. CONST. amends 5 and 14, and UTAH CONST. art 1 §17. For one accused of a serious crime to defend himself, he must have clear and reasonable notice.

But what if as here, the notice is ambiguous? Utah R. Crim. Pro. 26(4)(a) states that all appeals in criminal cases shall be taken within 30 days after the entry of judgment appealed from. The rule at 26(2)(c) includes interlocutory orders as appeals to be authorized for defendant to take. But R. Utah Ct. App. 5(a) only allows 20 days for filing petition for interlocutory appeal. Rule 5(a) includes those environments wherein a direct right of appeal lies. Nowhere is the conflict in the two areas

reconciled. No case law addresses the issue. Nor is there any statutory authority for an appellate court to totally disregard the clear notice provision that "all" (not just some) appeals in criminal cases are entitled to 30 days.

The Court of Appeals in its Order (App A hereto) supports its position by stating that "[the] '30-day limitation for appeals contained in Rule 26(4)(a) must be read to refer to appeals 'as a matter of right' taken from final judgments." But that is not what the Utah R. Crim. Pro. 26(4)(a) appears to say. It does not say "only those appeals taken as a matter of right." Nor does the rule say "some appeals in criminal cases shall be taken within 30 days."

The notice in Rule 26(4)(a) is clear and unambiguous. In not affording defendant-petitioner herein the benefit of that reasonable reliance the Court of Appeals denied him due process of law under the three constitutional provisions cited above.

Defendant-Petitioner has been unable to find authority precisely on point, to wit: in a conflict between a court rule permitting 30 days for all criminal charges to be appealed, or 20 days for interlocutory appeals with no reference or exception stated for criminal cases, which version controls. However, petitioner herein would argue by analogy that principles of construction for criminal statutes generally should apply here:

An underlying principle of criminal law is that all are entitled to be informed as to what the state commands or forbids and no one should be required, at peril of life, liberty, or property, to speculate as to the meaning of penal statutes. Fundamental fairness requires that no person be held criminally responsible for conduct which he could not reasonably understand to be proscribed.

Crimes are not to be created by inference nor may they be constructed nunc pro tunc. Words that are vague and fluid, it is said, may be a trap for the innocent and no obedience may be exacted to a rule or standard that is so vague and indefinite as to be in effect no rule or standard at all. (Citations and footnotes omitted).

21 Am.Jur.2d. §16, p. 128.

This conflict of rules creates such a trap for the unwary. It allows courts, including appellate courts, to define and redefine simple and clear, but contradictory rules and terms after-the-fact. Hence, 30 days becomes 20 days, and "all" becomes "some". One is reminded of Humpty-Dumpty's rules of construction in Alice's Adventures in Wonderland: "when I use a word, it means exactly what I say it means, and no more and no less."

This does not appear to be Constitutional notice to affected persons, especially those charged with serious crimes, as to what the law expects. Even if a good argument could be made for either construction, fundamental fairness and due process should construe the ambiguity in favor of the accused, not the state.

The remaining issue is whether petitioner in fact filed with the Court of Appeals within 20 days in any event. Petitioner respectfully leaves to this court constructions and inferences inherent in the computation of time between October 6, 1989, when the first filing was received, and the date petitioner was allegedly "out of time". Should consideration be given to Exhibit B, that receipt of appeal filing was made by the Court of Appeals on October 6th? Of the conflict between the letter of acknowledgment of filing (Exhibit C) and the Order (Exhibit A)

showing filing of an October 10th and 12th, respectively? Of the circuit court's not even mailing a copy of Judge Mower's order until requested, and then not arriving until one week before the Court of Appeals would have the petition's filing date due?

This Court is respectfully requested to carefully review these issues.

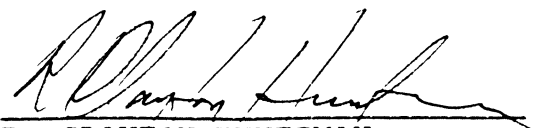
VIII. CONCLUSION

This case should at least be given a fair hearing on the appellate level. The rules should be applied so that this criminal appeal is given the benefit of the full 30 days allowed by the Rules of Criminal Procedure. This case should be remanded to the Utah Court of Appeals to consider granting interlocutory appeal on the merits, not dismissed on a questionable technicality. Due Process should prevail over all.

IX. APPENDIX

- A. Order of Court of Appeals
- B. Copy of Court of Appeals Acceptance of Filing
- C. Letter from Clerk of Utah Court of Appeals stating Petition docketed on October 10th, 1989.

Respectfully submitted this 2nd day of March, 1990.


R. CLAYTON HUNTSMAN
Attorney for Petitioner and
Defendant

CERTIFICATE OF SERVICE BY MAILING

I do hereby certify that on the 2nd day of March, 1990,
I mailed a true and correct copy of the above and foregoing
PETITION FOR WRIT OF CERTIORARI TO THE UTAH COURT OF APPEALS by
placing same in the United States Mail, postage prepaid, to the
following, to wit:

Paul Van Dam
UTAH ATTORNEY GENERAL
236 State Capitol Building
Salt Lake City, Utah 84114


Secretary

Client

-----00000-----

JAN 4 1990
Mary Noonan
Mary T. Noonan
Clerk of the Court
Utah Court of Appeals

Respondent.

Case No. 890595-CA

Before Judges Orme, Garff and Davidson (On Law and Motion).

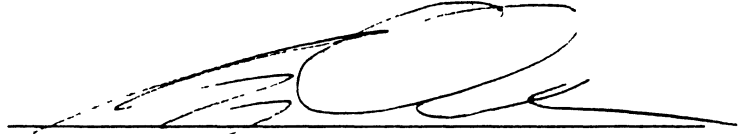
The 30-day limitation for appeals contained in Rule 26(4)(a) must be read to refer to appeals "as a matter of right" taken from final judgments. An interlocutory appeal, by contrast, is a discretionary appeal. Utah R. Crim. Pro 26(2)(c) recognizes the discretionary nature of interlocutory appeals by its reference to determination by the appellate court to grant or deny the opportunity to appeal an interlocutory order. The procedures for initiating an interlocutory appeal, including applicable time limitations, are governed by appellate rules. This court is specifically precluded from extending the time limitation in R. Utah Ct. App. 5(a) by R. Utah Ct. App. 2.

IT IS HEREBY ORDERED THAT the petition for permission to appeal is denied because it was not timely filed, and

IT IS FURTHER ORDERED THAT petitioner's request for oral argument and motion to strike the State's answer to the petition are each denied.

DATED this 4th day of January, 1990.

FOR THE COURT:

A handwritten signature in dark ink, appearing to read 'Gregory K. Orme', is written over a horizontal line.

Gregory K. Orme, Judge

CERTIFICATE OF MAILING

I hereby certify that on the 4th day of January, 1990,
a true and correct copy of the foregoing ORDER was deposited in the
United States mail.

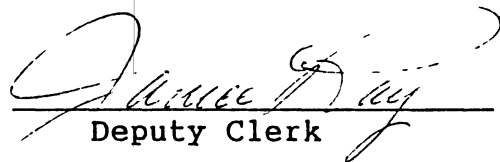
R. Clayton Huntsman
Attorney for Petitioner
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Tower Building, Ancestor Square, Suite 31
P.O. Box 1425
St. George, Utah 84771

R. Paul Van Dam
State Attorney General
David B. Thompson
Assistant Attorney General
Governmental Affairs
B U I L D I N G M A I L

Tex R. Olsen
Wayne County Attorney
225 North 100 East
Richfield, Utah 84701

DATED this 4th day of January, 1990.

By


Deputy Clerk

"B"



BILL TO: CLAYTON, R, ATTORNEY AT LAW
2 WEST ST GEORGE BLVD STE 31
ST GEORGE, UT 84770

SENDER ACTIVITY SUMMARY

PAGE 1 OF 1
DATE 10/19/89

INVOICE NO. 6-914-33681 ACCOUNT NO. 1266-4158-3

TRACKING NOS REFERENCE	SENDER'S NAME AND ADDRESS	RECIPIENT INFORMATION AND PROOF OF DELIVERY	PACKAGES & WEIGHT	SERVICES	CHARGES	NET CHARGES
7521649870	R CLAYTON HUNTSMAN CLAYTON, R, ATTORNEY AT LAW 2 WEST ST GEORGE BLVD STE 31 ST GEORGE, UT 84770	UTAH COURT APPEALS SUITE 400 230 SO 500 EAST 400 MIDTOWN P SALT LAKE CITY, UT 84102 AA DELIVERED 10/06/89 08:37 SIGNED: J.WHITFIELD	1/ 3	PRIORITY BOX DISCOUNT	26.25 -3.00	
6447103 1	DROP OFF 10/05/89					23.25
SENDER SUBTOTAL			23.25	PAY THIS AMOUNT		23.25

FedEx M-0148 5/89

QUESTIONS? CALL OUR BILLING SERVICE CENTER, 800-622-1147, 7 AM - 7 PM (CST) MONDAY-FRIDAY

12911

Richard C. Davidson
Siding Judge

Russell W. Bench
Associate Presiding Judge

John M. Billings
Judge

Michael W. Garff
Judge

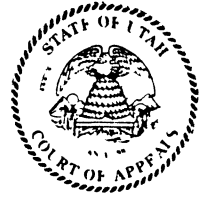
Michael T. Greenwood
Judge

Norman H. Jackson
Judge

Gregory K. Orme
Judge

Utah Court of Appeals

400 Midtown Plaza
230 South 500 East
Salt Lake City, Utah 84102
801 533 6800



Mary T. Noonan
Clerk of the Court

October 10, 1989

R. Clayton Huntsman, Esq.
2 West St. George Boulevard
Tower Building, Ancestor Square - Suite 31
P.O. Box 1425
St. George, Utah 84771

Re: State v. Tiffany
Court of Appeals No. 890602-CA
Trial Court No. 89-CR-89

Dear Mr. Huntsman:

Please be advised that the Notice of Appeal in this case was filed with the Court of Appeals on October 10, 1989. The case number is 890602-CA, and should be so indicated on any future filings.

The appellant is required to request from the court reporter a transcript of such parts of the proceedings not already on file as the appellant deems necessary. Rule 11(e) requires that this be done within 10 days of filing the notice of appeal. The request must be in writing, and within the same period, a copy must be filed with the clerk of the Court of Appeals. If no such parts of the proceedings are to be requested, within the same period the appellant must file a certificate to that effect with the clerk of the court from which the appeal is taken and a copy with the clerk of the Court of Appeals. The Docketing Statement, consisting of original and five copies, is due October 26, 1989.)

Sincerely, .

Julia Whitfield
Deputy Clerk

cc:
R. Paul Van Dam, State Attorney General
Tex R. Olsen, Wayne County Attorney

Sixth Circuit Court
Wayne County

See this in any event

*With 4 of 11
Notice of Appeal filed
and 126
proceedings report may be
supplied*

EXHIBIT "C"

OFFICE OF
THE ATTORNEY GENERAL



STATE OF UTAH

R. PAUL VAN DAM - ATTORNEY GENERAL

236 STATE CAPITOL • SALT LAKE CITY, UTAH 84114 • TELEPHONE 801 538 1015 • FAX NO 801 538 1121

JOSEPH E. TESCH
CHIEF DEPUTY ATTORNEY GENERAL

April 4, 1990

FILED

APR 4 1990

Clerk, Supreme Court, Utah

Geoffrey J. Butler
Clerk of the Court
Utah Supreme Court
332 State Capitol
Salt Lake City, Utah 84114

Re: Dale J. Tiffany v. State of Utah,
Case No. 900101

Dear Mr. Butler:

The respondent, State of Utah, hereby waives the right to file a Brief in Opposition to Petition for Writ of Certiorari in the above-referenced case pursuant to Rule 47(d), Rules of the Utah Supreme Court. This waiver does not constitute a stipulation that the petition should be granted, but rather, it is respondent's position that the petition should be denied based upon the legal analysis contained in the order of the Utah Court of Appeals which is attached to this letter. In the event that the Court deems an additional response by the State necessary to its determination, a Brief in Opposition will be provided.

Thank you for your consideration.

Very truly yours,

David B. Thompson

DAVID B. THOMPSON
Assistant Attorney General
Chief, Criminal Appeals Division

DBT:bks

cc: R. Clayton Huntsman
Attorney for Petitioner

Enclosure

JAN 4 1990
Mary Noonan
Clerk of the Court
Utah Court of Appeals

-----00000-----

Respondent.

Case No. 890595-CA

Before Judges Orme, Garff and Davidson (On Law and Motion).

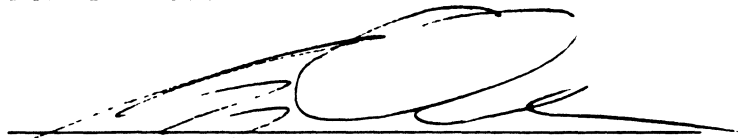
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DATED this 4th day of January, 1990.

FOR THE COURT:

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Gregory K. Orme, Judge

CERTIFICATE OF MAILING

I hereby certify that on the 4th day of January, 1990,
a true and correct copy of the foregoing ORDER was deposited in the
United States mail.

R. Clayton Huntsman
Attorney for Petitioner
2 West St. George Boulevard
Tower Building, Ancestor Square, Suite 31
P.O. Box 1425
St. George, Utah 84771

R. Paul Van Dam
State Attorney General
David B. Thompson
Assistant Attorney General
Governmental Affairs
B U I L D I N G M A I L

Tex R. Olsen
Wayne County Attorney
225 North 100 East
Richfield, Utah 84701

DATED this 4th day of January, 1990.

By


Deputy Clerk